91-8674

ORIGINAL

Supreme Court, U.S.
FILED
JUN 19 1992
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

JOHN ANGUS SMITH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

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COMES NOW the Petitioner John Angus Smith, pursuant to Rule 46.1 of the Supreme Court Rules, and respectfully moves for leave to file the accompanying Petition for Writ of Certiorari in the Supreme Court of the United States without payment of costs, and to proceed in forma pauperis.

Petitioner has been found financially unable to obtain counsel, and undersigned counsel was appointed to represent him pursuant to Title 18, U.S.C., Section 3006A; therefore the Petitioner relies upon Title 18, U.S.C., Section 3006(d)(6) and has not attached the affidavit which would have been otherwise required by Title 28, U.S.C., Section 1915(a).

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PETITION FOR WRIT OF CERTIORARI

TO THE

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI

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John Angus Smith respectfully petitions the Supreme Court of the United States for a Writ of Certiorari to review the opinion and judgment of the United States Court of Appeals for the Eleventh Circuit rendered and entered in Case Number 91-5062 of that Court on April 8, 1992, which affirmed the judgment of the United States District Court for the Southern District of Florida.

## QUESTIONS PRESENTED FOR REVIEW

### ISSUE I

WHETHER THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN DEFENDANT'S CONVICTION FOR USE OF A GUN DURING AND IN RELATION TO A DRUG TRAFFICKING FELONY IN VIOLATION OF 18 U.S.C. SECTION 924(c)(1) BECAUSE THE FIREARM WAS USED AS AN ITEM OF BARTER, THAT IS, TO TRADE THE GUN FOR DRUGS.

### ISSUE II

WHETHER THE FAILURE OF THE TRIAL COURT TO SUFFICIENTLY DEFINE THE MEANING OF USE OF A FIREARM DURING AND IN RELATION TO A DRUG TRAFFICKING CRIME CONSTITUTED PLAIN ERROR.

## LIST OF PARTIES TO THE PROCEEDINGS

The parties to this proceeding are the UNITED STATES OF AMERICA and JOHN ANGUS SMITH.



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### OPINION BELOW

A copy of the Eleventh Circuit Court of Appeals judgment, reported at 957 F.2d 835, affirming the judgment of the District Court, is attached hereto as Appendix I.

## BASIS OF JURISDICTION

The judgment giving rise to this Petition for a Writ of Certiorari was rendered April 8, 1992. Jurisdiction is invoked under Title 28, United States Code, Section 1254(1).

## STATEMENT OF THE CASE

Defendant-Petitioner, John Angus Smith, will be referred to as the Defendant in this brief when his name is not used. The United States of America, the Plaintiff-Respondent, will be referred to as "the government." Pleadings and other documents in the record on appeal will be referred to by volume number, document file number, and page number. Transcripts will be referred to by volume number and page number.

### Course of Proceedings and Disposition in the District Court

John Angus Smith was charged in a third superseding eight count indictment with (I) conspiracy to possess with intent to distribute cocaine, in violation of Title 21, United States Code, Section 846; (II) attempted possession with intent to distribute cocaine, in violation of Title 21, United States Code Section 841(a)(1) and Title 18, United States Code Section 2; (III) knowingly using an automatic firearm and silencer during and in relation to a drug trafficking crime, in violation of Title 18,



United States Code Section 924(c)(1); (IV) possession of firearms and ammunition as a convicted felon in interstate commerce, in violation of Title 18, United States Code Sections 922 (g)(1) and 924 (a)(2); (V) possession of unregistered automatic firearms, in violation of Title 26, United States Code Sections 5861(d) and 5871; (VI) possession of silencers without serial numbers, in violation of Title 26, United States Code, Section 5842; (VII) interstate transportation of a stolen motor vehicle, in violation of Title 18, United States Code Sections 2312 and 2; and (VIII) possession of firearms as a fugitive from justice in violation of Title 18, United States Code Sections 922 (g)(2) and 924 (a)(2). (R1:87).

Defendant's jury trial began on October 31, 1990 and concluded on November 7, 1990. (R:113, 115, 117, 118; R4-R7:90-613). Defendant's motions for judgment of acquittal at the close of the Government's case and after all evidence was presented were denied. (R6:542-558). On November 7, 1990, the jury returned a verdict of guilty as to all counts. (R2:118; R7:609-610).

On January 29, 1991, the Defendant was sentenced to a term of incarceration of 33 months as to counts 1, 2, 4, 5, 6, 7, and 8, each count to run concurrently and 360 months as to count 3 to run consecutively to all other counts. (R2:140). The defendant was also given three years supervised release. (R2:138).

## STATEMENT OF THE FACTS

On December 27, 1989, John Angus Smith, arrived in Dania, Broward County, Florida. (R6:454). Traveling with him was Charles Roy Davis, the co-defendant in the case. (R6:460). Upon his arrival, Smith encountered Debbie Hoag, a known prostitute and drug user who was also a confidential informant for the Broward County Sheriff's Office. (R4:223-226, 260; R6:460-61).

Smith was in possession of an automatic MAC-10 firearm with a silencer. He wanted to trade that weapon for a quantity of cocaine and informed Hoag of that wish. (R4:203-4). Hoag claimed that she was going to contact a pawnbroker who she believed would be interested in purchasing the weapon. Instead, she contacted Robert Landeville, a detective for the Sheriff's Office, who pretended to be a pawnbroker. (R4:200, 3:41).

Landeville traveled to the Leo Motel where Smith, Davis, and Hoag were located. (R4:201-03; R6:463). Smith discussed the barter arrangement with Landeville and an agreed upon trade of two (2) ounces of cocaine for the gun was arranged. (R4:204). At trial, Landeville could only recall that Smith discussed trading the weapon for the cocaine. (R4:229). Davis, the co-defendant, who had entered a plea agreement, testified when called by the government, that Smith had also told Landeville that Smith was also interested in trading the gun for money. (R6:463-64). The government introduced a statement of the defendant into evidence in



which he stated he was trying to trade the gun for money to buy food. (R5:305).

Landeville left the motel ostensibly to obtain the cocaine for the trade. (R4:205). However, upon leaving he proceeded to contact other law enforcement officers who were involved in the matter including surveillance officers at the scene. (R4:212).

During this time period, Smith left the motel. When he left the motel room, he carried with him the black gun case that appeared to be the same one that had contained the MAC-10 gun displayed to Landeville. (R4:237; R6:466). In the motel room, Smith had presented a black gun case that contained the MAC-10 gun and a silencer to Landeville. (R4:204). There was no evidence presented that the MAC-10 gun was ever loaded including even when Smith was later apprehended. At the motel room, Smith had also displayed to Landeville a pistol which he had retrieved from his rear waistband area. (R4.205).

The black gun case was placed in his vehicle and Smith departed the area in the vehicle. (R4:237). The surveillance officers began following Smith and eventually attempted to pull him over. (R4:238). After a chase, Smith's vehicle was cornered. (R4:245). Smith raised his hands by the windows in a surrender posture, but the officers instead fired. (R4:246). Smith received wounds in his ear lobe, fingers, and leg. (R4:250, 277-78; R5:295-6). No weapon was ever pulled by Smith. The unloaded MAC-10 gun and silencer were found in the black zippered case in the van. (R5:323).

On the next morning, deputies of the Sheriff's Office obtained a search warrant and searched the vehicle that Smith was driving. (R5:312-13). Ammunition and numerous other weapons were found concealed within the vehicle. (R4:214-220; R5:312-366).



## ARGUMENT

### ISSUE I

**THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN DEFENDANT'S CONVICTION FOR USE OF A GUN DURING AND IN RELATION TO A DRUG TRAFFICKING FELONY IN VIOLATION OF 18 U.S.C. SECTION 924(c)(1) BECAUSE THE FIREARM WAS USED AS AN ITEM OF BARTER, THAT IS, TO TRADE THE GUN FOR DRUGS.**

In this case, the Government was unable to present substantial competent testimony to sustain a conviction of the charges of using a firearm during and in relation to a drug trafficking offense.

In the instant case, the MAC-10 gun alleged in Count III of the Indictment was displayed to Detective Landeville only once and solely for the purpose of bartering for two ounces of cocaine. (R4:204, 229). In fact, the defendant also offered to sell the gun outright instead of bartering it for the cocaine. (R5:305). At all other times, the gun remained securely encased in a gun bag and it was not loaded. (R4:204, 237; R5:323). At the time of the defendant's arrest, the gun remained within his vehicle and had not been removed from its case. (R5:323).

The factual situation of the instant case with regard to the MAC-10 gun is virtually identical to the situation in *United States v. Phelps*, 877 F.2d 28 (9th Cir. 1989), *rehearing en banc denied*, 895 F.2d 1281 (9th Cir. 1990) (Kozinski, J., dissenting to denial of hearing en banc) and cases cited therein.

In *Phelps, supra*, the appellant Marc Phelps offered to trade a MAC 10 illegally converted pistol for illegal drugs. The fact pattern of Phelps was described by the court as follows:

> Appellant Marc Phelps and his coconspirator Turnipseed needed a supply of ephedrine in the summer of 1987. They had an operative methamphetamine laboratory but needed one component, ephedrine, which was in short supply. Acting on an informant's tip, federal agent Fabriano negotiated with the conspirators and represented that he could supply the chemical if the price was right. At a later meeting, Fabriano was accompanied by Agent Paur, who agreed to pose as an associate and attempt to buy an automatic weapon.
>
> Phelps told the agents that he was an expert in guns and had experience in converting semi-automatic MAC 10 firearms to fully automatic mode. Agent Paur showed interest and asked to buy such a weapon. Phelps declined to make an outright sale but offered to give it to Paur on delivery of the first ten pound shipment of ephedrine. The automatic pistol was displayed and was unloaded and unregistered.
>
> The agents inspected the laboratory and weapon, obtained a search warrant, seized records and chemicals, and arrested Phelps and his coconspirator. Phelps was convicted by a jury of five counts, Count 5 being the charge of using a firearm during and in relation to a drug trafficking crime in violation of 18 U.S.C. Section 924(c)(1).

*Phelps, supra*, 877 F.2d at 29.

In the instant cause, the defendant displayed the MAC-10 weapon to undercover detective Landeville for the sole purpose of offering to trade it for two ounces of cocaine.

The *Phelps* court held:

> We conclude that the mere presence of a firearm does not trigger the statute. Congress directed the statute at "persons who chose to carry a firearm as an offensive weapon for a specific criminal act." Id. We apply the principle of lenity as we construe the ambiguous term "in relation to." See *Simpson v. United States*, 435 U.S. 6, 15, 98 S.Ct. 909, 914, 55 L.Ed.2d 70 (1978); *United States v. Sherbondy*, 865 F.2d 996, 1009 (9th Cir. 1988). Here, the firearm did not have a role in the crime as an offensive weapon. The firearm was not used "in relation to" the crime as a weapon would normally be used. Because Phelps used the gun only for barter, his conduct is excluded by the statute.



*Phelps, supra*, 877 F.2d at 30.

The Government's entire case against Smith was predicated on this barter theory: opening argument (R4:182-93), testimony of Landeville (R4:198-234), testimony of co-defendant Davis (R6:442-491), and closing argument. (R6:571-588, 597-600).[1]

While the appellant had also displayed a pistol from his waistband and showed it to Landeville, the MAC-10 had only been displayed when discussing the barter arrangement and it had been returned to the gun case and zippered when the appellant left the motel. (R4:237; R5:466). When the officers eventually searched the vehicle, the gun was found still securely encased in the gun case which was zippered. (R5:323). It was not loaded. (R5:323).

Therefore, as in *Phelps, supra*, the gun was not used "in relation to an offense" where the firearm facilitated or had a role in the crime, such as emboldening an actor who had the opportunity or ability to display or discharge the weapon to protect himself or intimidate others whether or not such display or discharge occurred. There was insufficient evidence as a matter of law with regard to the MAC-10 gun to show that it was used in violation of 18 U.S.C. section 924(c)(1). To sustain Smith's conviction, this Court must be satisfied that the government proved beyond a reasonable doubt that the Defendant "did knowingly use a firearm, that is a MAC-10 machinegun serial no. SAP92690, fitted with a

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[1]Landeville and Davis were the only witnesses who saw Smith in actual possession of the MAC-10 and were the only witnesses who testified to any of Smith's conversations regarding the weapon. Hoag never testified.

silencer, during and in relation to the drug trafficking crimes set forth in Counts I and II." (R1:87). *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942).

The decision of the Court of Appeals for the Ninth Circuit in *Phelps, supra,* held that 18 U.S.C. Section 924(c)(1) was **NOT** intended to punish the use of a firearm as an item of barter in negotiating the purchase of a controlled substance. The decision of the Court of Appeals for the Eleventh Circuit in the instant case directly conflicts with the decision in *Phelps, supra*. In fact, the decision in the instant case formally rejects the holding in *Phelps:*

> We believe the *Phelps* opinion's stress on a defendant's alleged intentions to use the weapon offensively is incorrect.

*United States v. Smith*, 957 F.2d 835, 836 (11th Cir. 1992).

The government in choosing to charge Defendant Smith with a violation of 18 U.S.C. section 924(c)(1) took upon itself the burden of proving each and every element of the crime charged. The government never demonstrated that Defendant Smith carried the firearm in violation of section 924(c)(1). Because the government failed to prove essential elements of the crimes charged, the trial court erred in not granting Defendant Smith's motion for Judgment of Acquittal and his conviction must be reversed.

Since the Government failed to sustain its burden of proof, no reasonably minded jury should have found the Defendant guilty beyond a reasonable doubt. *United States v. Bell*, 678 F.2d 547 (5th Cir. Unit B.) *(en banc), aff'd on other grounds*, 462 U.S.



(1983). In *Bell*, 678 F.2d at 549, the court concluded that "[i]t is not necessary that the evidence exclude every reasonable hypothesis of innocence or to be wholly inconsistent with every conclusion except that of guilt, provided a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt."

The evidence presented in the instant case was insufficient to permit the jury to draw the inference or connection between the evidence presented and the fact asserted. *See United States v. Henderson*, 693 F.2d 1030 (11th Cir. 1982). Failing to produce substantial evidence of the essential elements of the crimes charged requires reversal of the underlying conviction. *Henderson, supra*.

In the instant case, the Government has failed to show the Defendant's use of the alleged firearm in relation to a drug trafficking crime. The defendant's sole use of that firearm was for barter purposes, and accordingly this conduct does not violate 18 U.S.C. section 924(c)(1). *Phelps, supra.* In light of the failure of the Government to show this requisite element, the trial court erred in not granting a judgment of acquittal to the Defendant as to this element and, in turn, subsequently sentencing the Defendant under the mandatory minimum sentencing provisions of Section 924(c)(1) of Title 18 of the United States Code.

## ISSUE II

**THE FAILURE OF THE TRIAL COURT TO SUFFICIENTLY DEFINE THE MEANING OF USE OF A FIREARM DURING AND IN RELATION TO A DRUG TRAFFICKING CRIME CONSTITUTED PLAIN ERROR.**

The failure of the court to instruct the jury as to the limitation that a firearm used solely for barter does not violate 18 U.S.C. section 924(c)(1) was plain error. *United States v. Phelps*, 877 F.2d 28 (9th Cir. 1989), *reh'g denied en banc*, 895 F.2d 1281 (9th Cir. 1990); *see United States v. Solomon*, 856 F.2d 1572 (11th Cir. 1988).

The instruction given to the jury by the trial court did not fully explain the meaning of the phrase "in relation to," under 18 U.S.C. Section 924(c)(1). The instruction by the Court[2] with regard to the definition stated as follows:

> You may find a defendant used a firearm within the meaning of Section 924(c), that is, during and in relation to a drug trafficking felony, if you find that the firearm named in the count related to the defendant was an integral part of a drug trafficking crime as I have defined it. To be an integral part of such a crime, a firearm must be, first, present, second, available to the defendant in question, and third, in some way connected to the underlying drug trafficking crime.

Therefore, in addition to the sufficiency issue, the charge to the jury was deficient. The charge failed to properly define the term "in relation to" by omitting the holding of *Phelps, supra*. That is, the charge given omitted instructing the jury that the mere presence of a firearm does not trigger the statute, that the

[2]See appendix, Exhibit B.



firearm must have a role in the crime as an offensive weapon, and that the use of a weapon only for barter excludes that conduct as a violation of Section 924(c)(1). *Phelps, supra*. Pursuant to the plain error standard of Rule 52(b) of the Federal Rules of Criminal Procedure, the conviction for Count III must be reversed.

In *United States v. Solomon, supra*, the court analyzed the circumstance where a defendant does not request an instruction nor object at trial to the court's instruction. The court stated as follows:

> Rule 52(b) is a backstop protection against substantial injustice that might otherwise result from application of the usual rule, Fed.R.Crim.P. 30. That rule prohibits an appellate level complaint against a trial court's failure to furnish a particular jury instruction in absence of a request or objection at trial. An appellant asking the Court to reverse his conviction because of an omitted jury instruction must demonstrate that when considered in its entirety, the charge was so deficient that there is a "likelihood of a grave miscarriage of justice" point to an error so obvious that failure to notice it would seriously affect the fairness, integrity, or public reputation of judicial proceedings. In reviewing the trial court's jury instructions for plain error, the "touchstone is fundamental fairness."

*United States v. Solomon, supra*, 856 F.2d at 1577-78.

In the instant cause, the instruction fails to properly advise the jury as to the law. Instead, it essentially tells the jury that mere presence of the weapon during a drug trafficking crime violates the law.

Moreover, the facts of the instant cause fall outside *United States v. Stewart*, 779 F.2d 538 (9th Cir. 1985) and *United States v. Ramos*, 861 F.2d 228 (9th Cir. 1988), two cases distinguished in

*Phelps, supra*. *Phelps* also concluded that the fact patterns in those two cases were outside those of *Phelps*.

In *Stewart and Ramos, supra*, the Ninth Circuit stated that a firearm is used "in relation to" an offense if "the firearm facilitated or had a role in the crime, such as emboldening an actor who had the opportunity or ability to display or discharge the weapon to protect himself or intimidate others whether such display or discharge in fact occurred." Like in *Phelps*, Smith's display of the unloaded weapon did not embolden him within the meaning of Stewart and Ramos. *Phelps*, 877 F.2d at 31.

Thus, the trial court should have charged the jury that a firearm used solely for barter does not violate 18 U.S.C. section 924(c)(1), *United States v. Phelps*, 877 F.2d 28 (9th Cir. 1989), and that a firearm is used "in relation to" an offense if "the firearm facilitated or had a role in the crime, such as emboldening an actor who had the opportunity or ability to display or discharge the weapon to protect himself or intimidate others whether such display or discharge in fact occurred."[3]

Fundamental fairness therefore mandates that this Court reverse the conviction of John Angus Smith for Count III, the

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[3]In the opinion in the instant case, the Court of Appeals for the Eleventh Circuit never reached this issue because of its ruling on the first issue. The opinion at 957 F.2d at 836 footnote 4, states:

> Because we disagree with the Ninth Circuit's decision that use in trade does not constitute use for purposes of section 924(c)(1), we find no merit to defendant's contention that he was entitled to such a jury instruction.



charged violation of 18 U.S.C. section 924(c)(1) for which he received a consecutive mandatory 30 year sentence. Absent the proper instruction in regard to a definition of "in relation to," the charge was so deficient that there is a likelihood of a grave miscarriage of justice.

## CONCLUSION AND SUMMARY OF GROUNDS

## FOR GRANTING CERTIORARI

The decision of the Eleventh Circuit in the instant case is in direct conflict with the Ninth Circuit over the use of a firearm as an item of barter in a drug transaction. In the instant case, the Eleventh Circuit holds "that trading guns for drugs constitutes the use of a drug trafficking offense in violation of 18 U.S.C. Section 924(c)(1)." In contrast, the Ninth Circuit has held "that a firearm used as an item of barter in a drug transaction was not used 'in relation to' the drug transaction." *United States v. Phelps*, 877 F.2d 28 (9th Cir. 1989), *reh'g denied en banc*, 895 F.2d 1281 (9th Cir. 1990).

For the foregoing reasons, Petitioner urges the Supreme Court to grant this Petition for Writ of Certiorari so the decision may be reviewed after full briefing.

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**UNITED STATES of America, Plaintiff-Appellee,**

**v.**

**John Angus SMITH, Defendant-Appellant.**

**No. 91-5062.**

United States Court of Appeals, Eleventh Circuit.

April 8, 1992.

Defendant was convicted in the United States District Court for the Southern District of Florida, No. 90-6020-CR-JCP, James C. Paine, J., of use of firearm during and in relation to drug trafficking felony, and he appealed. The Court of Appeals, Edmondson, Circuit Judge, held that trading guns for drugs was use of firearm during and in relation to drug trafficking offense.

Affirmed.

**1. Weapons ⇐4**

To establish violation of prohibition against using firearm during and in relation to drug trafficking felony, Government must show that defendant either actually or constructively possessed firearm and used or carried firearm during and in relation to drug trafficking offense. 18 U.S.C.A. § 924(c)(1).

**2. Weapons ⇐4**

To be found in violation of statute prohibiting use of firearm during and in relation to drug trafficking felony, it was not required that defendant's intention be to use weapon offensively; prohibition included any use of firearm in relation to drug trafficking crimes. 18 U.S.C.A. § 924(c)(1).

**3. Weapons ⇐4**

Conviction for use of weapon in drug trafficking offense may be upheld despite defendant's claim of nonbelligerent reasons for having weapon, as long as possession is integral part of and facilitates commission of offense. 18 U.S.C.A. § 924(c)(1).

**4. Weapons ⇐4**

Trading guns for drugs constitutes use of firearm during and in relation to drug trafficking offense; when drug purchasers trade drugs for guns, trade not only facilitates but becomes illegal drug transaction. 18 U.S.C.A. § 924(c)(1).

Gary Kollin, Law Offices of Gary Kollin, Ft. Lauderdale, Fla., for defendant-appellant.

Linda Collins Hertz, Lisa T. Rubio, Asst. U.S. Attys., Miami, Fla., David I. Mellinger, Asst. U.S. Atty., Ft. Lauderdale, Fla., for plaintiff-appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before EDMONDSON and DUBINA, Circuit Judges, and ATKINS *, Senior District Judge.

EDMONDSON, Circuit Judge:

Defendant John Angus Smith tried to trade a MAC-10 machine gun and silencer for cocaine. The question presented is whether the use of a firearm in trade for drugs supports a conviction under 18 U.S.C. § 924(c)(1) for using a firearm during and in relation to a drug trafficking felony.[1]

[1] To establish a violation of 18 U.S.C. § 924(c)(1) in this circuit, the government must show the defendant (1) either actually or constructively possessed the firearms, and (2) used or carried the firearms during and in relation to the drug trafficking offense. *United States v. Poole*, 878 F.2d 1389 (11th Cir.1989). Smith admits to possession of the gun, but claims that his attempted barter is not the kind of use in

* Honorable C. Clyde Atkins, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

1. Smith also claims the district court abused its discretion by admitting fingerprint identification cards into evidence and denying his motion to sever two counts of his indictment for separate trial. We find no merit to these claims and affirm the district court's decisions.

relation to drug trafficking prohibited by section 924(c)(1).

Smith relies on *United States v. Phelps*, 877 F.2d 28 (9th Cir.1989), *reh'g denied en banc*, 895 F.2d 1281 (9th Cir.1990).[2] The defendant in that case had attempted to trade a MAC–10 for a chemical component he needed to manufacture an illegal drug, *Phelps*, 877 F.2d at 29; and the court decided that a firearm used as an item of barter in a drug transaction was not used "in relation to" the drug transaction. The *Phelps* court justified its conclusion by explaining that the defendant had no intention to use the firearm offensively, "as a weapon would normally be used." *Id.* at 30.[3]

We believe the *Phelps* opinion's stress on a defendant's alleged intentions to use the weapon offensively is incorrect.[4] The plain language of the statute supplies no such requirement, *see* 18 U.S.C. § 924(c)(1) (applying to "[w]hoever, during and in relation to any ... drug trafficking crime ... uses or carries a firearm ..."); *see also Phelps*, 895 F.2d at 1282–83 (Kozinski, J., dissenting); and in this circuit, the plain meaning of the statute controls "unless the language is ambiguous or leads to absurd results, in which case a court may consult the legislative history and discern the true intent of Congress." *United States v. Kattan-Kassin*, 696 F.2d 893, 895 (11th Cir.1983) (quoting *Jones v. Metropolitan Atlanta Rapid Transit Authority*, 681 F.2d 1376, 1379 (11th Cir.1982)). We see no ambiguity in section 924(c)(1) and disagree with the conclusion that use in relation to a drug trafficking crime somehow excludes use in trade for drugs.[5]

Smith's argument (and that of *Phelps*) seems particularly puzzling in the light of our position that violations of section 924(c)(1) do not require that firearms be "fired, brandished, or even displayed during the drug trafficking offense."[6] *Poole*, 878 F.2d at 1393. Many courts have found firearm use even where the firearms could not be used offensively because they were out of reach of the defendant, *see Poole*, 878 F.2d at 1390 (weapons partially concealed in ceiling and under clothes on floor of utility room and defendant in other room); *Rosado*, 866 F.2d at 970 (loaded revolver in defendant's car a short distance away from scene of transaction sufficient to show firearm "use"); inoperable, *United States v. York*, 830 F.2d 885, 891–92 (8th Cir.1987), (no firing pin; cylinder and barrel improperly aligned), *cert. denied*, 484 U.S. 1074, 108 S.Ct. 1047, 98 L.Ed.2d 1010 (1988); or unloaded, *United States v. Coburn*, 876 F.2d 372, 375 (5th Cir.1989) (defendant had no shells for unloaded shotgun mounted in truck window).

[2] More like this case are instances in which section 924(c)(1) convictions were upheld despite defendant's claim of non-belligerent reasons for having the weapon. *See United States v. Rivera*, 889 F.2d 1029, 1031 (11th Cir.1989) (defendant's status as police officer instructed to carry firearm at all times did not preclude his conviction under section 924(c)(1)), *cert. denied sub nom., Sud v. United States*, — U.S. —, 111 S.Ct. 93, 112 L.Ed.2d 65 (1990); *United States v. Payero*, 888 F.2d 928, 930 (1st Cir.1989) (defendant not entitled to have defense theory that he was carrying gun much as other people normally carry a wallet); *United States v. Meggett*, 875 F.2d 24, 26 (2d Cir.) (defendant claimed to be gun collector), *cert. denied sub nom., Bradley v. United States*, 493 U.S. 858, 110 S.Ct. 166, 107 L.Ed.2d 123 (1989); *United States v. Raborn*, 872 F.2d 589, 595 (5th Cir.1989) (defendant claimed gun was for protection from muggers).

[3] The lesson of these opinions is that use may be established by evidence of possession—and Smith concedes possession of the MAC–10—"if possession is an integral part of and facilitates the commission of the drug trafficking offense." *Poole*, 878 F.2d at 1393. Although facilitation of the offense has often been interpreted to mean firearm use for protection of drugs, *see Meggett*, 875 F.2d at 29; *United States v. Matra*, 841 F.2d 837, 841–42 (8th Cir.1988); or for the protection and emboldening of the defendant, *see United States v. Brown*, 915 F.2d 219, 224 (6th Cir.1990); *United States v. Vasquez*, 909 F.2d 235 (7th Cir. 1990), *cert. denied*, — U.S. —, 111 S.Ct. 2826, 115 L.Ed.2d 996 (1991); *United States v. Laing*, 889 F.2d 281, 289 (D.C.Cir. 1989), *cert. denied sub nom., Martin v. United States*, 494 U.S. 1008, 110 S.Ct. 1306, 108 L.Ed.2d 482 (1990); *Payero*, 888 F.2d at 929; *Rosado*, 866 F.2d at 970; we believe all that is needed is "an intent to use the weapon to facilitate *in any manner* the commission of the offense." *Phelps*, 895 F.2d at 1286 (Kozinski, J., dissenting).

[4] When drug purchasers trade guns for drugs, the trade not only facilitates, but also becomes, an illegal drug transaction. We therefore conclude that trading guns for drugs constitutes use of a firearm during and in relation to a drug trafficking offense in violation of 18 U.S.C. § 924(c)(1).

The conviction is AFFIRMED.

2. Smith suggests that this circuit adopted *Phelps* in *United States v. Poole*. His reading of *Poole* is incorrect; *Phelps* is cited in *Poole* only for the proposition that the mere presence of a firearm does not constitute use for the purposes of section 924(c)(1). *See Poole*, 878 F.2d at 1393. We agree that mere presence of a firearm is insufficient for a section 924(c)(1) violation, but we believe Smith's use of a firearm in trade for drugs constitutes more than that firearm's "mere presence" on the scene.

3. The government in *Phelps* conceded the absence of intent on defendant's part to use the weapon offensively; the government makes no such concession here.

4. Because we disagree with the Ninth Circuit's decision that use in trade does not constitute use for purposes of section 924(c)(1), we find no merit to defendant's contention that he was entitled to such a jury instruction.

5. We would reach the same conclusion if forced to confront the legislative history of section 924(c)(1). *See* S.Rep. No. 225, 98th Cong., 1st Sess. 314 n. 10, *reprinted in* 1984 U.S.Code Cong. & Admin.News 3182, 3492 n. 10 (requirement that use be "in relation to" crime precluding statute application where firearm's "presence played no part in the crime, such as a gun carried in a pocket and never displayed or referred to in the course of a pugilistic barroom fight"); *see also Phelps*, 895 F.2d at 1283–84 (Kozinski, J., dissenting) ("Congress used the broad term 'in relation to' precisely to avoid interpretive hair-splitting about peculiar and unexpected factual scenarios that might escape a more narrowly drawn definition"); *United States v. Rosado*, 866 F.2d 967, 970 (7th Cir.) (Congress did not intend that statute be given a "cramped reading"), *cert. denied*, 493 U.S. 831, 110 S.Ct. 117, 107 L.Ed.2d 79 (1989).

6. That the gun in this case was displayed is undisputed. The record is unclear as to whether it was loaded; but ammunition was readily accessible in the black case in which the gun was packed. Smith's MAC–10 had been modified to fire in a fully automatic mode capable of dispensing 950 rounds per minute.



Tommy J. MARBURY, Plaintiff-Appellant,

v.

Louis W. SULLIVAN, Secretary of Health and Human Services, Defendant-Appellee.

No. 91-7138.

United States Court of Appeals, Eleventh Circuit.

April 8, 1992.

Claimant sought social security disability benefits. Administrative law judge (ALJ) denied benefits, appeals council affirmed, and claimant appealed. The United States District Court for the Middle District of Alabama, No. 87-H-1053-E, Truman M. Hobbs, J., affirmed, and claimant appealed. The Court of Appeals held that: (1) expert testimony was required to determine whether claimant's limitations were severe enough to preclude him from performing wide range of light work, and (2) ALJ erred in evaluating claimant's testimony concerning his pain.

Reversed and remanded.

Johnson, Senior Circuit Judge, filed specially concurring opinion.

IN THE

SUPREME COURT OF THE UNITED STATES

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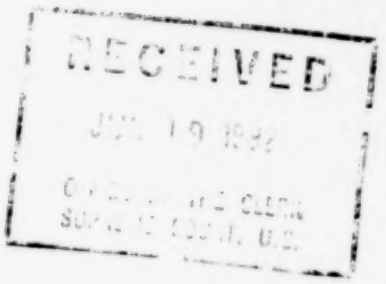
JOHN ANGUS SMITH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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CERTIFICATE OF SERVICE

I certify that on this 16th day of June, 1992, in accordance with Rule 33 of the Rules of the Supreme Court of the United States, copies of the

(1) Motion for Leave to Proceed in Forma Pauperis,

(2) Petition for Writ of Certiorari, and

(3) Certificate of Service,

were served by mail upon the United States Attorney for the Southern District of Florida, 155 South Miami Avenue, Miami, Florida 33130, and upon the Solicitor General, Department of Justice, Washington, D.C. 20530, by mail.

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